84-1088

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIO DE MODENA, DBA SIXTH AVENUE PHARMACY, *et al.*,

Petitioners,

v.

KAISER FOUNDATION HEALTH PLAN, INC., *et al.*,

Respondents.

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.,

Petitioner,

v.

KAISER FOUNDATION HEALTH PLAN, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS AS AMICUS CURIAE IN SUPPORT OF PETITION

RICHARD M. RINDLER
(counsel of record)
ROBERT J. DOMINGUEZ
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100
Attorneys for the Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIO DE MODENA, dba SIXTH AVENUE PHARMACY, *et al.*,

Petitioners,

v.

KAISER FOUNDATION HEALTH PLAN, INC., *et al.*,

Respondents.

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.,

Petitioner,

v.

KAISER FOUNDATION HEALTH PLAN, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS AS AMICUS CURIAE IN SUPPORT OF PETITION

QUESTIONS PRESENTED

Does the Robinson-Patman Act, the Nonprofit Institutions Act, or the Health Maintenance Organization Act grant an implied exemption from the Robinson-Patman Act for purchases of drugs by health maintenance organizations for resale to their subscribers?

Are health maintenance organizations charitable institutions covered by the Nonprofit Institutions Act?

Are drugs purchased by health maintenance organizations for resale to their subscribers purchases of "supplies for their own use" under the Nonprofit Institutions Act and thereby exempt from the Robinson-Patman Act, where the health maintenance organization knowingly purchases drugs at discriminatorily low prices without any cost justification pursuant to the Nonprofit Institutions Act exemption and resells the drugs in direct competition with disfavored retail pharmacies?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATUTES INVOLVED	2
REASONS FOR GRANTING THE WRIT	4
ARGUMENT	5
I. Congress Has Not Exempted HMOs From The Robinson-Patman Act	5
II. The Ninth Circuit's Broad Construction Of The Nonprofit Institutions Act Exemption For "Charitable Institutions" Is Unsupported And Conflicts With The Purposes Of The Robinson-Patman Act	8
III. The Ninth Circuit's Blanket Exemption Of Drugs Purchased By HMOs For Resale To Their Members Is Contrary To The Purposes Of The Robinson-Patman Act And Conflicts With The Court's Decision In *Portland Retail Druggists*	12
IV. CONCLUSION	17

TABLE OF AUTHORITIES

CASES: **PAGE**

Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1 (1976) ..... *passim*

DeModena v. Kaiser Foundation Health Plan, 743 F.2d 1388 (9th Cir. 1984) 12, 14

FTC v. Henry Broch & Co., 363 U.S. 166 (1960) 6

FTC v. Sun Oil Co., 371 U.S. 505 (1963) 6

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) ... 6

Jefferson County Pharmaceutical Association v. Abbott Laboratories, 460 U.S. 150 (1983) 9-10, 16

National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378 (1981) 8, 10

Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956) 13

STATUTES:

Health Maintenance Organization Act, Pub. L. No. 93-222, 87 Stat. 914 (1973) (codified at 42 U.S.C. § 300e *et seq.*) ..... *passim*

Nonprofit Institutions Act, Pub. L. No. 75-550, 52 Stat. 446 (1976) (codified at 15 U.S.C. § 13c) ..... *passim*

Robinson-Patman Price Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (1976) (codified at 15 U.S.C. § 13(a)) ..... *passim*

LEGISLATIVE MATERIALS:

H.R. REP. NO. 2161, 75th Cong., 3d Sess. 1 (1938) ... 6

H.R. REP. NO. 1983, 90th Cong., 2d Sess. 79 (1968) .. 16

H.R. REP. NO. 451, 93d Cong., 1st Sess. 21 (1973) ... 13

H.R. REP. NO. 714, 93d Cong., 1st Sess. 30 (1973) ... 13

S. REP. NO. 1769, 75th Cong., 3d Sess. 1 (1938) 6, 10

S. REP. NO. 129, 93d Cong., 1st Sess. 11 (1973) 13

119 CONG. REC. 15,497 (1973) 15

119 CONG. REC. 42,505 (1973) 15

OTHER AUTHORITIES:

Operational Prepaid Health Care Plans in the United States—OHMO (October 1, 1984) 1

G. F. Bartz, Assistant Attorney General, Tax Section, Letter to G. Sullivan, Oregon Department of Revenue, Corporation Audit 1 (August 27, 1982) . 11

Robinson, *The HMO/PPO surge—Pharmacy tries to cope*, 128 Drug Topics 48 (June 4, 1984) 1, 13

All parties have consented to the filing of this Brief for amicus curiae in support of the petition for writ of certiorari, pursuant to Rule 36.2 of the Court.

INTEREST OF AMICUS CURIAE

Founded in 1898, the National Association of Retail Druggists (NARD) is a private, nonprofit, voluntary organization composed of approximately 20,000 independent retail pharmacists, who own approximately 30,000 independent retail pharmacies. NARD is the only national association which represents exclusively the interests of independent retail druggists. NARD has members in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. NARD members serve an estimated 18 million consumers daily. Independent retail pharmacists fill approximately 60% of the prescriptions filled at retail in the United States.

Members of NARD compete with each other, with chain drug stores, with for-profit and nonprofit hospital pharmacies, with fee for service physicians, and with for-profit and nonprofit health maintenance organizations (HMOs) in the sale at retail of prescription and non-prescription drugs. The decision by the Ninth Circuit exempting nonprofit HMOs from the strictures of the Robinson-Patman Act prohibiting price discrimination adversely affects NARD members because it allows nonprofit HMOs, with which NARD members increasingly find themselves in competition,[1] a favored competitive position by allowing the HMOs to knowingly obtain pharma-

---

[1] In 1984 there were 342 HMOs in the United States. Two thirds of these HMOs are nonprofit. In 1983 HMOs had 15 million subscribers. *See* Operational Prepaid Health Care Plans in the United States—OHMO (October 1, 1984). Given the encouragement of this form of health care by the government it is estimated that 50 million Americans will be covered by HMOs by 1993. Robinson, *The HMO/PPO surge—Pharmacy tries to cope*, 128 Drug Topics 48 (June 4, 1984).

ceuticals at discriminatorily low, non cost justified prices. As a result NARD members have lost, and will continue to lose, retail sales, profits, and competitive position in the retail prescription and nonprescription drug markets. The applicability of the Robinson-Patman Act to purchases of pharmaceuticals for resale by nonprofit HMOs is of vital interest to retail pharmacists, and the decision of the Ninth Circuit that such purchases are beyond the reach of the Robinson-Patman Act has a direct and significant impact on NARD members.

STATUTES INVOLVED

1. Section 2 of the Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1976) (codified with some differences in language at 15 U.S.C. § 13(a)) (hereinafter cited as 15 U.S.C. § 13 (a)):

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

2. The Nonprofit Institutions Act, Pub. L. No. 75-550, 52 Stat. 446 (1976) (codified with some differences in language at 15 U.S.C. § 13c) (hereinafter cited as 15 U.S.C. § 13c):

> . . . that, nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, Second Session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their sup-

plies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

3. The Health Maintenance Organization Act, Pub. L. No. 93–222, 87 Stat. 914 (1973) (codified with some differences in language at 42 U.S.C. §300e *et seq.*):

> § 300e. (a) For purposes of this subchapter, the term "health maintenance organization" means a legal entity which (1) provides basic and supplemental health services to its members in the manner prescribed by subsection (b) of this section, and (2) is organized and operated in the manner prescribed by subsection (c) of this section.
>
> (b) A health maintenance organization shall provide, without limitations as to time or cost other than those prescribed by or under this subchapter, basic and supplemental health services to its members in the following manner:
>
> (1) Each member is to be provided basic health services for a basic health services payment . . . . A health maintenance organization may include a health service, defined as a supplemental health service by section 300e-1(2) of this title, in the basic health services provided its members for a basic health services payment described in the first sentence . . . .
>
> (2) For such payment or payments (hereinafter in this subchapter referred to as "supplemental health services payments") as the health maintenance organization may require in addition to the basic health services payment, the organization may provide to each of its members any of the health services which are included in supplemental health services (as defined in section 300e-1(2) of this title) . . . .
>
> § 300e-1. For purposes of this subchapter:
>
> (1) The term "basic health services" means—
>
> (A) physician services (including consultant and referral services by a physician);
>
> (B) inpatient and outpatient hospital services;

(C) medically necessary emergency health services;

(D) short-term (not to exceed twenty visits), outpatient evaluative and crisis intervention mental health services;

(E) medical treatment and referral services (including referral services to appropriate ancillary services) for the abuse of or addiction to alcohol and drugs;

(F) diagnostic laboratory and diagnostic and therapeutic radiologic services;

(G) home health services; and

(H) preventive health services (including (i) immunizations, (ii) well-child care from birth, (iii) periodic health evaluations for adults, (iv) voluntary family planning services, (v) infertility services, and (vi) children's eye and ear examinations conducted to determine the need for vision and hearing correction . . . .

(2) The term "supplemental health services" means any health service which is not included as a basic health service under paragraph (1) of this section. If a health service provided by a physician may also be provided under applicable State law by a dentist, optometrist, podiatrist, or other health care personnel, a health maintenance organization may provide such service through an optometrist, dentist, podiatrist, or other health care personnel (as the case may be) licensed to provide such service.

REASONS FOR GRANTING THE WRIT

The Case Presents Important Questions Of Federal Law Which Should Be Settled By The Court

Whether Congress in enacting an exemption from the Robinson-Patman Act for "charitable institutions" intended to exempt sales at non-cost-justified discriminatorily low prices to purchasers who resell at the same functional level is, as the Ninth Circuit noted, a question of first impression. Based on its misreading of the legislative history of the Nonprofit Institu-

tions Act and the Health Maintenance Organization Act ("HMO Act"), the Ninth Circuit has broadly expanded a narrow exemption from the antitrust laws and in so doing has misapplied the Court's decision in *Abbott Laboratories v. Portland Retail Druggists Association*, 425 U.S. 1 (1976) ("*Portland Retail Druggists*"). The Ninth Circuit's decision turns on its head Congress' intent in passing the Nonprofit Institutions Act and the HMO Act by giving an unfair competitive advantage to one of several competitive forms of retail drug distribution.

The Court should grant a writ of certiorari in this case because of the obvious need for a definitive construction of language in the Nonprofit Institutions Act and because of the need to provide a definitive statement of the relationship between the antitrust laws and the Health Maintenance Organization Act.

ARGUMENT

I. Congress Has Not Exempted HMOs From The Robinson-Patman Act

The Ninth Circuit's decision allows nonprofit HMOs to knowingly induce and receive discriminatorily low prices for drugs which the HMOs then resell to their members in competition with other retail methods of distribution. This result was based on the Ninth Circuit's interpretation of the charitable institutions exemption to the Robinson-Patman Act. The decision creates a broad exemption from the Robinson-Patman Act for the resale of drugs by HMOs to their members. This exemption has no basis in the language or legislative histories of the Robinson-Patman Act, the Nonprofit Institutions Act, or the HMO Act.

The Robinson-Patman Act makes it unlawful for one engaged in commerce to discriminate in price between different purchasers of like commodities where "the effect of such discrimination may be substantially to lessen competition." 15

U.S.C. § 13(a). The Act "was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). The Robinson-Patman Act was enacted to ensure that competition among business institutions that operate "at the same functional level" is fair. *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

In 1938, Congress enacted the Nonprofit Institutions Act, which exempts from the Robinson-Patman Act purchases by "schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit" of "supplies for their own use . . . ." 15 U.S.C. § 13c. The legislative history of the Nonprofit Institutions Act indicates that its drafters intended to ensure that the recently enacted Robinson-Patman Act did not preclude sellers from favoring eleemosynary institutions with reduced prices. S. REP. NO. 1769, 75th Cong., 3d Sess. 1 (1938); H.R. REP. NO. 2161, 75th Cong., 3d Sess. 1 (1938).

In the case most related to this one the Court stated: "The antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and . . . exceptions from their application are to be construed strictly." *Abbott Laboratories v. Portland Retail Druggists Association, supra*, 425 U.S. at 11 (1976) (citations omitted). "[O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

In *Portland Retail Druggists, supra*, the Court applied these antitrust law principles to limit narrowly the scope of the exemption available to nonprofit hospitals, one of the specifically enumerated institutions under the Nonprofit Institutions Act. The Court declined to grant nonprofit hospitals a blanket exemption for all pharmaceutical purchases and held that drugs purchased for uses not intrinsically connected with the

hospital's basic institutional functions (the care of its patients) were not exempt.

> [T]here is nothing in the [Nonprofit Institutions] Act that indicates that its exemption provision is to be applied and expanded automatically to whatever new venture the nonprofit hospital finds attractive in these changing days. The Congress surely did not intend to give the hospital a blank check. Had it so intended, it would not have qualified purchases by nonprofit institutions in the way it did in § 13c.

425 U.S. at 13. In particular, the Court held that prescription refills for former hospital patients, dispensations for personal use to persons other than hospital staff members and their dependents, and sales to walk-in (non-patient) purchasers were not within the exemption to the Robinson-Patman Act.

The Robinson-Patman Act by its terms does not exempt drug purchases by HMOs.[2] The only relevant express exemption is that contained in 15 U.S.C. § 13c for hospitals and other nonprofit "charitable institutions."

Congress did not exempt HMO purchases from the application of the Robinson-Patman Act when it enacted the Health Maintenance Organization Act and subsequent amendments thereto. That Act was intended to promote a *competitive* alternative for health care. It was not intended to favor with an

---

[2] To the extent that a nonprofit hospital purchases drugs for use in providing health care to the members of an HMO, those purchases are exempt under the Nonprofit Institutions Act under the Court's decision in *Portland Retail Druggists, supra*, provided the pharmaceuticals are used solely for purposes intrinsic to the *hospital's* basic institutional purposes. While the Ninth Circuit's conclusion that respondents' hospitals are eligible for the Nonprofit Institutions Act exemption is, therefore, facially correct, the decision failed to restrict the exemption to the uses by the hospitals allowed under *Portland Retail Druggists*. To that extent, the Ninth Circuit's decision is in direct conflict with *Portland Retail Druggists* and should be reversed. The Ninth Circuit's decision is further impaired by its failure to examine whether the complex of profit and nonprofit corporations which constitute the Kaiser Health Plan is a nonprofit organization. *See* n.7, *infra*.

antitrust exemption any particular competitive health care alternative.[3]

In *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981), the Court declined to imply an exemption from the federal antitrust laws where the basis upon which the implied exemption was sought was a conflict between a national health policy statute and the antitrust laws. It is even more inappropriate to infer an exemption for HMOs where, as in the case of the HMO Act, Congress specifically addressed conflicts between state laws and the HMO Act, but was silent on the relationship between that Act and the federal antitrust laws.[4]

II. The Ninth Circuit's Broad Construction Of The Nonprofit Institutions Act Exemption For "Charitable Institutions" Is Unsupported And Conflicts With The Purposes Of The Robinson-Patman Act

The Ninth Circuit's conclusion that HMOs are charitable institutions within the meaning of the Nonprofit Institutions Act and therefore eligible for exemption from the Robinson-Patman Act is contrary to established principles of antitrust law and, because it is premised upon considerations irrelevant

---

[3] The legislative history of the HMO Act makes it clear that Congress did not intend to exempt HMOs from the antitrust laws. The 1973 Act, as well as all of its subsequent amendments, was prepared by the Senate Labor & Public Welfare and the House Interstate & Foreign Commerce Committees, which have jurisdiction over health matters. None of the HMO bills was referred to or reported from the Senate and House Judiciary Committees, which have exclusive jurisdiction over antitrust matters. In fact, the antitrust laws were never mentioned during the debates or in the committee reports on the HMO Act of 1973 or its 1976, 1978 and 1981 amendments.

[4] Congress specifically preempted state laws that impeded establishment of HMOs, since such laws were deemed anticompetitive. Congress never suggested that an exemption from the basic competitive structure established by the federal antitrust laws was appropriate.

to the purposes of the Robinson-Patman Act, fundamentally conflicts with the policies and goals of that Act.

The Ninth Circuit relies upon cryptic statements in the meager legislative history of the Nonprofit Institutions Act as the basis for its broad construction of the term "charitable institutions" in the Act. While the legislative history of the Nonprofit Institutions Act reflects a desire on the part of its drafters to exclude eleemosynary institutions from the scope of Robinson-Patman, it provides no basis for the Ninth Circuit's expansive reliance on the definitions of that term that have subsequently been developed in the state charitable trust laws and tax laws. Indeed, the legislative history of the Nonprofit Institutions Act makes no reference whatsoever to those bodies of law.

The fact that some of the same types of institutions that are exempt from the Robinson-Patman Act are also the beneficiaries of special consideration under tax laws does not justify application of the definitions of charitable institutions developed in this unrelated area of law in the antitrust context. The purposes for which eleemosynary institutions are accorded special consideration under the tax laws are quite separate and distinct from the rationale for the antitrust exemption.

The special consideration given nonprofit institutions under federal tax law reflects a legislative determination that such institutions should operate as inexpensively as possible, free of the financial burden of government. Tax exemptions "redistribute the burden of costs from the actual consumers [of the services or products of exempt institutions] to the citizen at

large." *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 158 n.17 (1983).[5]

While the exemption embodied in the Nonprofit Institutions Act is also intended to permit nonprofit institutions to operate as inexpensively as possible, it is a limited exemption which must be construed in light of the purposes of the Robinson-Patman Act. *Portland Retail Druggists*, *supra*, 425 U.S. at 13–14. This Act is intended to ensure fair competition among entities that buy and resell similar products at the same functional level. Eleemosynary institutions are exempt from the Robinson-Patman Act in recognition of the fact that such institutions *do not compete* with other purchasers when they purchase supplies for use in discharging their charitable functions rather than for resale. *See* S. REP. NO. 1769, 75th Cong., 3d Sess. 1 (1938). Application of the Robinson-Patman Act's restrictions to such entities would further no purpose of that Act. HMOs by contrast must fall within the coverage of the Robinson-Patman Act since Congress in passing the HMO Act was specifically intending to encourage the development of a *competitive* entity to provide an alternative in the health care market.

The basis for the antitrust exemption for charitable institutions is, therefore, distinct from the purpose of the exemption

---

[5] The Court in that case declined to expand the Nonprofit Institutions Act exemption to include purchases of drugs by hospitals owned by state or municipal entities. After making the observation quoted above, the Court observed that "an exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors." 460 U.S. at 158 n.17 (emphasis in original). The Court thus acknowledged a distinction between tax and antitrust exemptions for charitable institutions. The reasoning in *Jefferson County* is equally applicable to any nonprofit institutions that benefit from these tax exemptions.

under the tax laws.[6] The Ninth Circuit's reliance on present day construction of the term "charitable institution" in the tax and state charitable trust laws is, therefore, misplaced, particularly in light of the established principles that require narrow construction of exemptions from the antitrust laws.[7] The application of the Ninth Circuit's definition to HMOs creates the anomalous result of giving nonprofit HMOs, which Congress assisted in order to encourage competition with other forms of health care, a significant unfair competitive advantage over for-profit HMOs, for-profit hospitals, and retail pharmacies.

---

[6] The inapplicability of tax law principles in the antitrust context is underscored further by the inconsistent treatment of respondents' health plan by federal and state tax agencies. While the federal government has accorded respondents' plans tax-exempt status (except to the extent they sell drugs to nonmembers), the State of Oregon has determined that the "Kaiser Foundation Health Plan . . . is a commercial organization and not a charity" and is, therefore, subject to state property tax. G. F. Bartz, Assistant Attorney General, Tax Section, Letter to G. Sullivan, Oregon Department of Revenue, Corporation Audit 1 (August 27, 1982).

[7] Even if the Court were to adopt the construction given to this term by the present day tax and state charitable trust laws, it is highly questionable whether the respondents meet even those criteria since Kaiser revenues are distributed for the private gain of for-profit entities. The physicians who service respondents' members annually receive incentive compensation that varies according to the HMOs' financial performance. In addition, substantial sums are contributed to pension funds by the HMOs on behalf of the physicians. The amounts of these contributions also vary according to the HMOs' financial performance. The significant degree to which the "nonprofit" HMOs reward the for-profit physicians who service their members based upon their financial success raises serious doubts as to whether the HMOs are nonprofit institutions, even under the tax and charitable trust laws.

Assuming, arguendo, the propriety of using present day tax or charitable trust law analogies, it is unclear which definition of the term "charitable institution" should be used. Clearly there are numerous different state and federal tax definitions, and state charitable trust definitions.

III. The Ninth Circuit's Blanket Exemption Of Drugs Purchased By HMOs For Resale To Their Members Is Contrary To The Purposes Of The Robinson-Patman Act And Conflicts With The Court's Decision In *Portland Retail Druggists*

The Nonprofit Institutions Act creates only a limited exemption for sales to eleemosynary institutions, expressly applicable only to purchases of supplies "for [the] own use" of eligible institutions. In *Portland Retail Druggists*, *supra*, the Court interpreted this language narrowly to include only those purchases that are necessary to the discharge of the intrinsic, basic functions of an exempt institution.

In *Portland Retail Druggists* the Court defined the functions which it considered to be "for [the] use" of one of the Nonprofit Institutions Act's enumerated institutions—a hospital. In attempting to apply this approach to an HMO, the Ninth Circuit simply concluded that "any sale of drugs by an HMO to one of its members falls within the basic function of the HMO" because HMOs have an "extraordinary broad institutional function." *DeModena v. Kaiser Foundation Health Plan*, 743 F.2d 1388, 1393 (9th Cir. 1984). This conclusion ignores the fact that Congress has defined the basic functions of an HMO[8] and specifically rejected a bill which would have made drug benefits

---

[8] Basic services required for federal qualification under the HMO Act include physician services, inpatient and outpatient hospital services, medically necessary emergency health services, short term outpatient evaluative and crisis intervention mental health services, medical treatment and referral services for abuse of or addiction to alchohol and drugs, diagnostic and therapeutic radiologic services, home health services and certain preventive services. Health Maintenance Organization Act of 1973, Pub. L. No. 93-222 § 1302, 87 Stat. 914 (1973) (codified with some differences in language at 42 U.S.C. § 300e-1).

a required service.[9] Congress expressly declared that the provision of prescription drugs to HMO members is a *supplemental, nonmandatory* HMO service.[10] 42 U.S.C. §§ 300e(b)(1)-(2), 300e-1(1)-(2).

---

[9] The Senate version of the 1973 bill required HMOs to provide prescription drugs, directly or through arrangements with other retail pharmacists, and expressed a corollary desire that HMOs evaluate and review their members' drug utilization. S. REP. No. 129, 93d Cong., 1st Sess. 11 (1973). The House bill listed prescription drug services as supplemental health services. H.R. REP. No. 451, 93d Cong., 1st Sess. 21 (1973). The final conference committee version designated the provision of drugs prescribed by HMOs in the course of providing health care services as a supplemental service. H.R. REP. No. 714, 93d Cong., 1st Sess. 30 (1973).

Unlike the provision of hospital and medical services, the retail pharmaceutical industry has been vigorously competitive for many years. Although not expressly acknowledged in the legislative history of the HMO Act, it is clear that remedial action to create a competitive alternative of the sort undertaken in the HMO Act was unnecessary in the retail pharmaceutical industry.

[10] Presently about half of all HMOs offer a drug benefit. Robinson, *The HMO/PPO surge*, *supra* at 48. Typical prescription drug benefit plans available through HMOs allow members, for an additional monthly fee, to purchase drugs at little or no cost. This is the case with respondents' plans. In fact, as many as 30% of Kaiser members do *not* purchase the drug option. Kaiser nonetheless resells prescription drugs to these members. These sales should, under *Portland Retail Druggists*, be treated as walk-ins and should not be exempt. Distribution in this manner is in direct competition with disfavored retail distributors.

Moreover, the profits earned from sales at market-level retail prices of prescription drugs acquired at a significant non-cost-justified reduced price under the Nonprofit Institutions Act exemption obviously affect the overall financial performance of respondents' health plans. The profits derived therefrom ultimately inure to the benefit of the for-profit physicians that service respondents' plan members. *See* n.7 *supra*. Such activities more closely resemble the commercial, for-profit transactions that were deemed nonexempt in *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49, 50 n.5 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956) (sales to self-sustaining campus bookstores of supplies that were resold at a profit held not exempt under Nonprofit Institutions Act), than the activities of an institution purchasing supplies for use in discharging charitable functions.

The Ninth Circuit's conclusion that all sales of drugs by HMOs to their members fall within the basic functions of HMOs is, therefore, contrary to the facts and the plain language of the HMO Act, and finds no support in the legislative history of the HMO Act. Accordingly, drugs purchased by an HMO for dispensation to members are not "for [their] own use" by the HMO within the meaning of the Nonprofit Institutions Act, except to the extent they are dispensed to HMO members by hospitals in a manner consistent with the Court's decision in *Portland Retail Druggists*.[11] To hold as the Ninth Circuit did that HMOs are exempt from the Robinson-Patman Act with respect to all sales of drugs to their members is to grant HMOs a "blank check" to pursue "whatever new venture [the HMOs] find attractive," in direct conflict with the Court's decision in *Portland Retail Druggists*. 425 U.S. at 13.[12]

The legislative history of the HMO Act as indicated above reveals that Congress did not intend to create *favored* channels for retail distribution of pharmaceuticals or the delivery of health care services, but rather to augment the competitive options available to the health care consumer. The legislative

---

[11] The Ninth Circuit suggests that fee for service nonprofit hospitals would enjoy a market advantage over HMOs if HMOs did not qualify for an exemption for drugs provided to their members. *DeModena v. Kaiser Foundation Health Plan*, 743 F.2d at 1394. The broad exemption created by the Ninth Circuit for HMOs is not necessary to address this concern. This "problem" could have easily been resolved by applying the Court's decision in *Portland Retail Druggists* to the nonprofit Kaiser hospitals. In fact, what the Ninth Circuit has done is to give nonprofit HMOs an unfair competitive advantage over *all other* retail sellers of prescription drugs.

[12] Respondents have refused to certify to drug suppliers that the drugs they purchase at favored prices are "for their own use," a procedure approved by the Court in *Portland Retail Druggists* as a means for suppliers to protect themselves from antitrust liability under the Robinson-Patman Act. 425 U.S. at 20–21. Moreover, respondents have advised suppliers who have requested such a certificate that they would not continue to deal if the favored prices were conditioned upon the provision of such certification.

history of the Act is replete with comments like those of Senator Kennedy, Chairman of the Health and Scientific Research Subcommittee that conducted hearings on the bill in the Senate:

> Our health care system at the present time is monolithic. This bill seeks to introduce some small degree of pluralism into that system so that the American people may have a choice in determining how they wish to purchase *health care services*—through their family doctor or through an HMO. This legislation would make such a choice possible.

119 CONG. REC. 15,497 (1973) (emphasis supplied).

> I strongly believe that the introduction of diversity and pluralism into our current health care system is desirable. The existence of HMO's [sic], where they have been successful, stimulated healthy innovation and competition in the rest of the health care industry in the area. I believe in competition in the health care industry, and I believe *HMO's* [sic] *are one proven form of health care which can be competitive with the existing system.*

119 CONG. REC. 42,505 (1973) (emphasis supplied). Congress determined in enacting the HMO Act to increase the number of competitive options available to health care consumers by providing federal assistance for the development and operation of HMOs to make them competitive with other, more established health care services. Nowhere in the legislative history, however, is there expressed a desire to grant HMOs an unfair *competitive advantage* over other health care providers or retail pharmaceutical distributors.

The blanket exemption granted by the Ninth Circuit is fundamentally inconsistent with the purposes of the Robinson-Patman Act. As discussed *supra*, the exemptions established in the Nonprofit Institutions Act recognize, in effect, that eleemosynary institutions do not operate "at the same functional level" as other purchasers to the extent they use supplies

for their own intrinsic charitable purposes. To the extent that eligible institutions do not restrict uses of products acquired at favored prices to charitable purposes, however, they do compete at the same functional level as disfavored purchasers and should not benefit from the exemption. Indeed, a House subcommittee investigating practices in the pharmaceutical industry in the 1960s observed that "[t]here is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, *profit or nonprofit*, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." H.R. REP. NO. 1983, 90th Cong., 2d Sess. 79 (1968) (emphasis supplied). In *Jefferson County*, *supra*, the Court interpreted this language to mean that "*private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices." 460 U.S. at 166 (emphasis in original).

IV. CONCLUSION

The Ninth Circuit's decision is contrary to the policies of the Robinson-Patman Act, the Nonprofit Institutions Act and the Health Maintenance Organization Act. The Ninth Circuit's decision is in conflict with the Court's decisions in *Portland Retail Druggists* and *National Gerimedical*. The Ninth Circuit's decision grants HMOs an unfair competitive advantage over retail druggists and other retail distributors of drugs who compete at the same functional level as HMOs and broadens the Nonprofit Institutions Act exemption beyond the limits intended by Congress and established by the Court in *Portland Retail Druggists*.

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD M. RINDLER
(counsel of record)
ROBERT J. DOMINGUEZ
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100
Attorneys for the National Association of Retail Druggists, Amicus Curiae

January 2, 1985